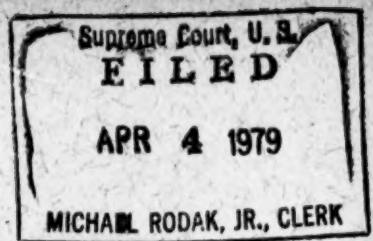


No. 78-1191



In the Supreme Court of the United States
OCTOBER TERM, 1978

**JOHN JOSEPH CERRELLA AND
THOMAS JOSEPH CHIANTESE, PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINIONS BELOW

The original opinion of the court of appeals is reported at 546 F. 2d 135. The opinion of the court of appeals en banc is reported at 560 F. 2d 1244. The opinion of the panel on remand from the en banc court is reported at 582 F. 2d 974.

JURISDICTION

The judgment of the court of appeals on remand was entered on October 27, 1978. A petition for rehearing and suggestion for rehearing en banc was denied on December 13, 1978. The petition for a writ of certiorari was not filed until January 19, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instruction on intent constituted reversible error.
2. Whether the district court erred in failing to hold a hearing on allegations that a juror made derogatory comments about defense counsel.

STATEMENT

Following a jury trial in the United States District Court for the District of Florida, petitioners were convicted of attempting to affect interstate commerce by means of extortionate threats, in violation of 18 U.S.C. 1951. Petitioner Cerrella was sentenced to 16 years' imprisonment; petitioner Chiantese was sentenced to a 13-year term.

1. The evidence at trial showed that two valet parking services were competing to serve bars and night clubs in Fort Lauderdale, Florida. One was owned by petitioner Cerrella and managed by petitioner Chiantese; the other was owned by one Mark Parnass. Petitioners repeatedly threatened Parnass in an effort to force him to pay one-third of his profits to Cerrella or to go out of business. When Parnass asked if petitioners wanted to buy into his business, Cerrella responded, "No. We don't buy, we take." Parnass was also informed by Cerrella that both petitioners knew where Parnass and his family lived and that they would "hurt" him if they had to. The evidence also included recorded threats by Cerrella to Parnass that Cerrella would put him in the hospital and, after he came out, would put him in again or would put him "in a box" (Pet. App. 10-12).

2. A panel of the court of appeals reversed the convictions (546 F. 2d 135). The court held, first, that the

district court erred by giving the so-called *Mann* charge.¹ The charge given by the district court was as follows (see 546 F. 2d at 136; italics in original):

As a general rule it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. *So, unless the evidence in the case leads the jury to a different or contrary conclusion*, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

The court noted that the charge had been disapproved in previous cases, and it concluded that it should reverse petitioners' convictions in order to make it clear that the charge should not be used by the district courts in the circuit under any circumstances.

The panel based its reversal on a second ground as well. During trial, the court was informed that during a cross-examination by petitioner Cerrella's attorney, a student employed by petitioner Chiantese's counsel overheard a juror say to two of the alternate jurors, "Stupid. Stupid. He's a pain in the ass" (Tr. 407). Counsel for Chiantese requested an investigation to determine whether the remarks had been made and, if so, what effect they may have had on the jurors who heard them. The judge declined to conduct such an investigation. He observed that even if such remarks had been made and overheard,

¹The name of the charge derives from *Mann v. United States*, 319 F. 2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964), in which the court reversed a conviction because the charge had been given.

they were not analogous to outside influences or juror comments about the evidence of a kind that may taint a verdict (Pet. App. 12).

On the basis of these facts, the panel concluded that the trial judge should have conducted an inquiry into the alleged misconduct to determine what prejudice, if any, resulted from the juror's comments.

3. After considering the case en banc, the court of appeals overturned the panel's judgment and remanded the case to the panel for further consideration (560 F. 2d 1244). The court instructed the district courts that the *Mann* charge should not be used, nor should any instruction on proof of intent be used if it is "couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence" (560 F. 2d at 1255). The court stated that a district court could properly charge that "it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts" (*ibid.*), but that it would not be proper for the court to instruct in terms of a presumption that the person intends the natural consequences of his acts or to instruct that the jury may draw the inference of intent "unless the contrary appears from the evidence" (*ibid.*). The court held that these requirements would be applied prospectively only, because the law of the circuit had been too uncertain to warrant the reversal of otherwise valid convictions, absent some showing of prejudice flowing from the use of the disapproved language in the *Mann* instruction.²

²The en banc court stated that the use of a *Mann* charge in the future would not be grounds for "automatic[]" reversal, because the weighing of the harm of the instruction to the accused would remain "a judicial matter to be resolved in the context of each case where it occurs" (560 F. 2d at 1255). The court added, however, that the weighing in the future "shall not include consideration of whether a defective charge has been cured by prior or subsequent statements" (*ibid.*).

4. On remand, the panel affirmed both convictions. Because the en banc court had applied its prophylactic rule only to trials commenced 90 days after the date of the en banc decision, the panel weighed the prejudice to petitioners in the context of the charge as a whole. In that light, the panel concluded, the numerous references to the government's burden of proof and to the lack of any requirement that the defendant call witnesses or present any evidence were sufficient to overcome any prejudice that might have resulted from the giving of the *Mann* instruction. It was manifest, the court concluded, "that the instructions given by the court below would leave no doubt in a juror's mind that the burden of proof on the issue of criminal intent remains invariably upon the government. * * * Moreover, several of these curative instructions were given in close proximity to the *Mann* charge, a factor found to mitigate the effect of the proscribed instruction" (Pet. App. 9).

The court held that there was an additional ground on which to sustain its disposition of the *Mann* charge issue. In this case there was ample objective conduct demonstrating criminal intent. The jurors were therefore "not reduced solely to presuming intent * * *. [T]he government's case did not rest upon mere implications of evil motive, but was supported by affirmative objective evidence of that particular element of the alleged crime" (Pet. App. 11, quoting from *United States v. Wilkinson*, 460 F. 2d 725, 733 (5th Cir. 1972)).

With respect to the juror's remark, the panel reversed its previous ruling. Where an allegation of juror misconduct involves influences from outside sources, the court noted, the failure to hold a hearing to determine the nature and possible prejudicial effect of the misconduct constitutes an abuse of discretion and is therefore reversible error. This is so, the court stated, "because a presumption of prejudice arises when the outside influence is brought to the attention of the trial court

* * * and it is incumbent upon the Government to rebut that presumption at a hearing" (Pet. App. 13). In this case, however, the court held that because there was no outside influence, the presumption of prejudice did not apply. Moreover, the court held that the juror's comments were not akin to discussions among the jurors about the evidence in the case prior to the time they retire to consider their verdict. The juror in this case, the court held, "did not commit herself to any outcome in the case or demonstrate a prejudgment of the evidence. * * * She simply reacted to the apparently overzealous cross-examination by Cerrella's attorney" (Pet. App. 15). In light of the broad discretion of the district court in determining whether the potential prejudice of the juror's remark would be outweighed by the disruptive effect of holding a hearing on the matter, the court held that the district court had not abused its discretion in this case.

ARGUMENT

1. Petitioners contend (Pet. 7-8) that the district court denied them due process of law by giving the so-called *Mann* charge. Petitioners object to two portions of the *Mann* charge: the portion that provides that "it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted," and the portion that instructs the jury that it may draw that inference "unless the evidence in the case leads the jury to a different or contrary conclusion."

The court of appeals criticized the charge for including the second provision quoted above. The quoted language, the court observed, may suggest that the defendant bears some burden to produce evidence of his innocent intent. The court, however, approved the first portion of the *Mann* charge, which instructs the jury that intent may ordinarily be inferred when a defendant knowingly engages in acts that naturally produce the result forbidden

by law. That inference is a proper one for a jury to draw and for the court to instruct on.³ See *United States v. Garrett*, 574 F. 2d 778 (3d Cir.), cert. denied, 436 U.S. 919 (1978); *United States v. Arthur*, 544 F. 2d 730, 737 (4th Cir. 1976); *United States v. Wetzel*, 514 F. 2d 175, 177-178 (9th Cir.), cert. denied, 423 U.S. 844 (1975); *United States v. Wilkinson*, 460 F. 2d 725, 733 (5th Cir. 1972). The instruction in *Sandstrom v. Montana*, cert. granted No. 78-5384 (Jan. 8, 1979), informed the jury that the law "presumes" that a person intends the ordinary consequences of his voluntary acts, an instruction that the court in this case stated would be impermissible. Because the instruction in this case was not couched in terms of a "presumption" but rather in terms of a permissible "inference," it is not necessary to hold this case pending the disposition of *Sandstrom v. Montana*.

With respect to the portion of the charge that the court of appeals disapproved, the court correctly held that in this case the charge did not prejudice petitioners. Any inference that might be drawn from the instruction that the burden of producing evidence may shift at some point to the defendant was cured, as the court of appeals stated, by the rest of the court's charge. The court repeatedly referred to the burden of proof borne by the government, and it instructed the jury that the burden never shifts to the defendant and that a defendant need not produce any evidence or call any witnesses in order to avoid conviction (Pet. App. 7-8). In addition, the court properly held that the instruction could not have been harmful in this case, because the evidence before the jury concerned objective conduct and statements that directly demonstrated the intent in question. There was no need

³The only prohibition stated by the court with respect to this portion of the charge was that the trial courts should instruct in terms of an "inference," not a "presumption." The instruction in this case was given in terms of an "inference."

for the jury to inquire into the circumstantial indicia of intent; the *Mann* charge in this case was thus more irrelevant than prejudicial.

2. Petitioners further assert (Pet. 9-11) that by making its ruling prospective, the en banc court denied petitioner the equal protection of the laws and violated the governing principles of retroactivity. Both propositions are wholly without merit. The court of appeals determined that in order to guard against further confusion, it would simply order district courts to cease giving charges of the kind given in this case. That prohibition was ordered not because the court considered that the *Mann* instruction invariably denies defendants due process, but because the court concluded that the pitfalls of the charge are too substantial to permit its continued use. The en banc court did not suggest that it would not review all cases involving the *Mann* charge to determine whether the defendant's right to a fair trial has been denied. The court simply stated that in the future, in order to discourage the use of the *Mann* charge, it will be less willing to entertain the argument that the charge was not prejudicial in a particular case.

The use of such a prophylactic device in the exercise of the court's supervisory powers over the district courts does not deny petitioners any rights to which they are entitled: the court of appeals conducted a searching inquiry into the issue of prejudice in this case and determined that the use of the *Mann* charge did not deny petitioners a fair trial. Whether the court acted properly in limiting its inquiry into the issue of prejudice in future cases of this kind is not presented here. It is not these petitioners but the prosecution that may be prejudiced by the court's reversal of convictions in future cases where there may be no actual prejudice.⁴

⁴The Third Circuit adopted the same approach in *United States v. Garrett*, 574 F. 2d 778, cert. denied, 436 U.S. 919 (1978). The court instructed that in the future district courts should not use the *Mann*

3. Petitioners contend (Pet. 11-12) that the trial court abused its discretion by failing to conduct an investigation of the juror's alleged remark about petitioner Cerrella's counsel. On this issue, we rely on the thorough analysis by the court of appeals (Pet. App. 12-16). As the district court and the court of appeals pointed out, this was not a case involving influences from outside sources that would raise a presumption of prejudice requiring a trial judge to conduct a hearing (Pet. App. 13-14). The juror's remarks here were merely a reaction to what the court of appeals below perceived to be "apparently overzealous cross-examination by Cerrella's attorney" (Pet. App. 15). The remarks said nothing about petitioners, the outcome of their trial, or the crime of attempting to interfere with interstate commerce by extortion.⁵

charge or any charge that suggests that the defendant bears any burden of producing proof of innocence. The court found, however, that the defendant was not prejudiced by the use of the charge in that case.

⁵The cases upon which petitioners rely (Pet. 11) involve private communication, contact, or tampering with a jury during trial about the matter pending before the jury, or the influence of the press upon the jury. They are therefore inapposite to this case, which involves only a comment by a juror that was unrelated to the evidence in the case or the issues of fact before the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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